No. 10148

IN THE

United States Circuit Court of Appeals

For The Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

J. G. BOSWELL COMPANY and CORCORAN TELEPHONE EXCHANGE,
Respondents.

Upon Petition for Enforcement of Orders of the National Labor Relations Board.

RESPONDENTS' PETITION FOR A REHEARING

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THE QUESTIONS INVOLVED

1. Should an employer which has assumed and repeatedly made known a neutral position with respect to its employees' right to self-organization be penalized by reason of anti-union statements and conduct on the part of subordinate employees who are not authorized to hire or fire or to speak for or bind the employer, and whose lack of such authority is generally known at the plant?

2. Should an employer be compelled to reinstate employees with back pay where the employer's operations are seasonal and there is no work available for them, and notwithstanding such fact their representative demands that they be reinstated in a body and none of such employees subsequently applies for reinstatement when work is available?

3. Is the employer compelled to reinstate an employee who is unwilling to accept employment at the regular wages and hours of work prevailing when he was last employed?

4. When the Board produces no evidence and makes no finding on the matter of potential earnings, is the employer precluded from raising the issue for the first time before the Court?

5. If an employer discharges a single employee who is not a member of any labor organization and has not assisted or attempted to assist any such labor organization and there is no showing that such employee is even sympathetic with a labor organization nor any showing that the discharge of such employee will discourage membership in any labor organization, or burden, obstruct or interfere with interstate commerce, is the employer guilty of violating the Act?

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TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND THE HONORABLE WILLIAM DENMAN, CLIFTON MATHEWS, AND ALBERT LEE STEPHENS, JUDGES THEREOF:

J. G. Boswell Company and Corcoran Telephone Exchange, the respondents herein, after the decision made and filed on May 24, 1943, and each of them, respectfully petitions the Court for rehearing upon the following grounds:

STATEMENT OF GROUNDS UPON WHICH REHEARING IS REQUESTED

I.

Respondent Boswell Company was improperly held responsible by the Board for the unauthorized anti-union statements and acts of its subordinate employees.

II.

None of the employees of respondent Boswell Company whom the Board found should be reinstated were refused reinstatement, and the Board's finding to the contrary was contrary to the evidence.

III.

The order of this Court enforcing the Board's order for the reinstatement by the respondent Boswell Company of Elgin Ely with back pay was erroneous in view of his admitted unwillingness to accept reemployment.

IV.

The matter of potential earnings of the employees of both respondents who were ordered reinstated with back pay should be remanded to the Board for determination even though such issue was not raised before the Board.

V.

The order of this Court directing respondent Exchange to reinstate Mrs. Dunn was erroneous as there was no showing or proof that her discharge affected, burdened, obstructed or interfered with interstate commerce.

ARGUMENT IN SUPPORT OF ABOVE GROUNDS

I.

RESPONDENT BOSWELL COMPANY WAS IMPROPERLY HELD RESPONSIBLE BY THE BOARD FOR THE UNAUTHORIZED ANTI-UNION STATEMENTS AND ACTS OF ITS SUBORDINATE EMPLOYEES.

The undisputed and uncontradicted evidence in the case against respondent J. G. Boswell Company, hereinafter called Boswell Company, established that the only persons with any authority to employ or discharge employees or to speak or act for the Company on any employment matters were Louis Robinson and Gordon Hammond, and that no other employee at the Corcoran plant had any such authority, and that such fact was well known to and recognized by the employees generally, including the complaining members of the Federal.

Respondent Boswell Company had taken a neutral position with respect to any of its employees joining or not joining a labor organization as they might see fit. This position was repeatedly communicated and made known to the employees as a whole, and particularly to several employees who later joined the Federal. In every instance when an alleged violation of this policy by certain of the so-called supervisory employees was called to the attention of the management, such employees were reprimanded and cautioned against repetition, and it was made clear to them that the respondent had adopted and intended to pursue a neutral policy. The management was scrupulous in trying to maintain its avowed position of neutrality and not only did not oppose the organization

of respondent's employees by Organizer Prior, but on the contrary afforded him every opportunity to obtain applications for membership in his union from such of the employees as desired to join.

Moreover after the organization of the Federal was completed by Mr. Prior, the management cooperated with him and with other representatives of the Federal in trying to provide more employment and keep the Federal members as well as all other employees at work as long as possible even though the cotton season was short and there was an acute lack of work to be performed.

It is important to bear in mind that the respondent Boswell Company's plant at Corcoran is comparatively small and is located in a rather compact unit, and that its operations are purely seasonal. At the period of peak employment in 1938 there were only 86 plant employees, and these employees were much closer to the management than would be the case in the ordinary industrial plant where hundreds or perhaps thousands of men are employed. The situation was entirely different from that prevailing in the ordinary large industrial plant where the management is remote from the rank and file employee, and the carrying out of the policies of the employer, as well as the hiring and firing of employees and the operations of the plant, are left to subordinate employees, such as foremen and straw bosses.

It is clear from all the facts and evidence that respondent Boswell Company did not have any anti-union policy, and that such fact was known to the employees as a whole, and they had no reason for

believing that any anti-union statements on the part of any of the so-called supervisory employees expressed the policy of the company.

We are not unmindful of the fact that the National Labor Relations Act provides that the findings of the Board as to the facts, if supported by evidence, shall be conclusive. The courts have uniformly held, however, that the findings of the Board are not conclusive unless supported by substantial evidence. We respectfully submit and contend that the findings of the Board with respect to the violations of the Act by respondent Boswell Company were not supported by substantial evidence as required by the construction placed upon the Act by the courts.

We are also familiar with the cases which hold the employer responsible for the unauthorized acts and deeds of supervisory employees where the circumstances are such that the employees can reasonably conclude or infer that such acts and deeds represent the attitude of the employer. In view of the fact that the evidence in this case clearly establishes that the management of respondent Boswell Company was not unfriendly toward the union and that no one connected with the respondent other than Louis Robinson and Gordon Hammond were authorized to speak for the respondent on labor matters and policies and that all of the anti-union statements, acts and deeds complained of were made and committed by persons who were wholly unauthorized to speak or act for the respondent, we submit that the respondent as a matter of law cannot be held responsible for the unauthorized acts and statements of its subordinate em-

ployees as held in the following cases, in a number of which the Board's petition for enforcement was denied: **Ballston-Stillwater Knitting Co. v. N.L.R.B.,** 98 Fed. (2d) 758, (C. C. A. 7); **Cupples Co. Manufacturers v. N.L.R.B.,** 106 Fed. (2d) 100, (C. C. A. 8); **N.L.R.B. v. Sands Manufacturing Company,** 306 U.S. 332; 83 L. Ed. 682; **N.L.R.B. v. Empire Furniture Co.,** 107 Fed. (2d) 92, (C.C.A. 6); **N.L.R.B. v. Swank Products,** 108 Fed. (2d) 872, (C. C. A. 3); **C. G. Conn Limited v. N. L .R. B.,** 108 Fed. (2d) 390, (C. C. A. 7); **Peninsular and Occidental S. S. Co. v. N. L. R. B.;** 98 Fed. (2d) 411, (C. C. A. 5); **Martel Mills v. N. L. R. B.,** 114 Fed. (2d) 624, (C. C. A. 4); **N. L. R. B. v. Mathieson Alkali Works, Inc.,** 114 Fed. (2d) 796, (C. C. A. 4); **The Press Co., Inc. v. N. L. R. B.,** 118 Fed. (2d) 937 (Ct. App. D. C. 1940); **E. I. du Pont de Nemours & Co., et al v. N. L. R. B.,** 116 Fed. (2d) 388, (C. C. A. 4); **N. L. R. B. v. Sparks-Withington Co.** 119 Fed. (2d) 78, (C. C. A. 6); **Quaker State Oil Refining Corp. v. N. L. R. B.,** 119 Fed. (2d) 631, (C. C. A. 3); **Diamond T. Motor Car Company v. N. L. R. B.,** 119 Fed. (2d) 978, 982, (C. C. A. 7); **Wilson & Co., Inc. v. N. L. R. B.,** 120 Fed. (2d) 913, (C. C. A. 7).

II.

NONE OF THE EMPLOYEES OF RESPONDENT BOSWELL COMPANY WHOM THE BOARD FOUND SHOULD BE REINSTATED WERE REFUSED REINSTATEMENT, AND THE BOARD'S FINDING TO THE CONTRARY WAS CONTRARY TO THE EVIDENCE.

Six of the seven employees of respondent Boswell Company who were ordered reinstated with back pay, namely, Spear, Martin, Wingo, Andrade, Farr and Powell, were men who left work following the unauthorized anti-union demonstration which occurred at the plant on the morning of November 18, 1938. These six men were all members of the Federal and E. F. Prior as business representative for the Federal represented them as well as the Federal in dealings with the respondent, both before and after such demonstration. After these six men were allegedly evicted on November 18th, Mr. Prior, as shown by the undisputed evidence, had several conferences with the management and demanded that all of these six men be reemployed immediately notwithstanding it was the end of the ginning season, and he knew, and so did the members of the Federal whom he represented, that some of the gins had already closed for the season and others were about to close, and as a consequence there was then no work available for all six of the men unless some of the other few remaining employees, who included a number of members of the Federal, who were still working, were laid off to make positions available for his men. It is an undisputable fact that the management offered to take back one or two of these six men for whom work was

then available, and also offered to take back the rest of them if and when work was available. This offer on the part of the respondent was flatly rejected, and we submit that under the facts respondent Boswell Company was not guilty of violating the Act by reason of its refusal to accede to the unreasonable demands of Mr. Prior, and that the Board's order for reinstatement of these six men is improper and is not supported by any substantial evidence.

Moreover all of the six men above named were in fact carried on the payroll to the end of the time that each of them would normally have been employed up to the close of the season's operations, and they did not suffer any loss of pay whatsoever.

III.

THE ORDER OF THIS COURT ENFORCING THE BOARD'S ORDER FOR THE REINSTATEMENT BY THE RESPONDENT BOSWELL COMPANY OF ELGIN ELY WITH BACK PAY WAS ERRONEOUS IN VIEW OF HIS ADMITTED UNWILLINGNESS TO ACCEPT REEMPLOYMENT.

The Board also directed that Elgin Ely be reinstated with back pay. He had left work a few days before the episode of November 18, 1938, because of an injury to his thumb. The gin upon which he had been working at the time of the injury was shut down on November 26, 1938. Although it was developed at the time of the hearing before the Trial Examiner that he had joined the Federal on November 11, 1938, there was no evidence that the respondent knew of such membership, and the finding of the Board that he was discriminated against was predicated solely upon the fact that on November 26, 1938 the respon-

dent advised him by letter that the job upon which he had been working was completed and that his employment was terminated. Such finding on the part of the Board was merely an inference erroneously arrived at and not based upon or supported by any evidence or facts. We realize the Board has authority under the Act to draw inferences and to base conclusions upon circumstantial evidence, but it seems to us that the evidence should at least be of a substantial character to warrant the court in adopting the Board's finding.

Elgin Ely testified he would accept employment with respondent Boswell Company if ordered reinstated, but negatived such testimony by also testifying that he was not satisfied with his previous employment and was unwilling to return to work for the same pay and at the same hours he had been working when last employed by respondent.

In view of the very flimsy and circumstantial evidence upon which the Board's finding of discrimination was based and Ely's admitted unwillingness to accept reemployment at the wages and hours prevailing when he left work, the order for his reinstatement with back wages was unwarranted and contrary to law and should be set aside by this Court. **Cupples Co. Manufacturers v. N. L. R. B.,** 106 Fed. (2d) 100, 118, (C. C. A. 8).

IV.

THE MATTER OF POTENTIAL EARNINGS OF THE EMPLOYEES OF BOTH RESPONDENTS WHO WERE ORDERED REINSTATED WITH BACK PAY SHOULD BE REMANDED TO THE BOARD FOR DETERMINATION EVEN THOUGH SUCH ISSUE WAS NOT RAISED BEFORE THE BOARD.

The Board failed to find either in the case against Boswell Company or in that against Corcoran Telephone Exchange, hereinafter called Exchange, as to whether any of the employees of the respective respondents who were ordered reinstated had made any effort to obtain other substantially equivalent employment, or whether they had refused such employment when offered. The evidence showed that several of the Boswell Company employees who were ordered reinstated were for several months engaged in picketing activities at said respondent's plant after their employment terminated, in an attempt to enforce a boycott against the respondent and its products notwithstanding no strike had been declared. Obviously they were making no effort to find other employment.

It is true that neither of the respondents raised this particular question in any of their proceedings before the Board, and that the Act provides (Section 10 (e)) that "no objection that has not been urged before the Board, its member, agent or agency, shall be considered by the Court unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." The issue of the potential earnings of each of the employees ordered

reinstated was, however, raised by each of the respondents in this Court in their answer to the Board's petition for enforcement. The Supreme Court expressly held in **Phelps Dodge Corp. v. N. L. R. B.**, 313 U. S. 177, 198-201, that such issue was properly raised before the Court and in the absence of a finding thereon by the Board, the matter should be remanded to the Board for determination. The Supreme Court in this regard stated:

> "Since only actual losses should be made good, it seems fair that deductions should be made not only for actual earnings by the worker but also for losses which he willfully incurred. To this the Board counters that to apply this abstractly just doctrine of mitigation of damages to the situations before it, often involving substantial numbers of workmen, would put on the Board details too burdensome for effective administration. Simplicity of administration is thus the justification for deducting only actual earnings and for avoiding the domain of controversy as to wages that might have been earned.
>
> "But the advantages of a simple rule must be balanced against the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment. The Board, we believe, overestimates administrative difficulties and underestimates its administrative resourcefulness . . . . . The matter should have been left to the Board for determination by it prior to formulating its order and should not be

left for possible final settlement in contempt proceedings.....

"The decree below should be modified in accordance with this opinion, remanding to the Board the two matters discussed under Fourth and Fifth herein, for the Board's determination of these issues."

The same rule was followed in each of the following cases which were decided after the **Phelps Dodge** case: **N. L. R. B. v. Suburban Lumber Co.**, 121 Fed. (2d) 829, 834, (C. C. A. 3); **N. L. R. B. v. Newberry Lumber & Chemical Co.**, 123 Fed. (2d) 831, 839, (C. C. A. 6); **Corning Glass Works v. N. L. R. B.**, 129 Fed. (2d) 969, C. C. A. 2).

The present case therefore should be remanded to the Board for a determination of whether or not any of the employees ordered reinstated made an effort to find other substantially equivalent employment after their employment with the respective respondents was terminated.

V.

THE ORDER OF THIS COURT DIRECTING RESPONDENT EXCHANGE TO REINSTATE MRS. DUNN WAS ERRONEOUS AS THERE WAS NO SHOWING OR PROOF THAT HER DISCHARGE AFFECTED, BURDENED, OBSTRUCTED OR INTERFERED WITH INTERSTATE COMMERCE.

The case against respondent Exchange so far as we have been able to ascertain presents a novel situation, both as to the facts and the law.

Only one employee, Mrs. Dunn, is involved. All the operations of the Exchange are local. It has only

about 300 subscribers, and a gross annual income of only approximately $15,000.00. There are only six or seven employees. There is no labor dispute involved and no labor organization of any kind at its plant. Mrs. Dunn, whom the Board found was discriminated against and was ordered reinstated with back pay, was not a member of any labor organization, was not eligible to membership in the Federal which was organized at the Boswell Company plant, and according to her own testimony, which was corroborated by the testimony of her husband, she never assisted or even attempted to assist any labor organization of any kind. In fact there was no evidence that she was even sympathetic to labor organizations in general, or to the Federal in particular. The Board found that respondent Boswell Company was not responsible for her discharge by the Exchange, and that the Exchange in discharging her did not act either directly or indirectly in the interest of respondent Boswell Company. The only possible connection between the labor trouble at the Boswell Company plant and her discharge by the Exchange was the fact that upon one occasion her daughters had gone to the picket line at the Boswell Company plant where they talked for a few minutes with Organizer Prior. Mrs. Dunn herself was the first one to apprise Mr. Glenn, the manager of the Exchange, that her daughters had gone to the picket line, and she explained to him the purpose of their visit, which had nothing whatever to do with the labor trouble at the Boswell plant or with any labor organization.

The Exchange was charged in the complaint with

having discharged Mrs. Dunn because of her suspected union activities. The evidence showed conclusively that Mrs. Dunn had not engaged in any union activities of any kind or character, and there was an utter lack of any evidence which would show or even tend to show that Mr. Glenn suspected her of any such activities.

The Board based its finding of discrimination solely upon a statement alleged to have been made by Mr. Glenn to the effect that pressure had been brought to bear upon him by certain unnamed business men in Corcoran to discharge Mrs. Dunn; and the Board inferred from purely circumstantial evidence that such pressure was the consequence of Mrs. Dunn's two daughters having been seen at the picket line when talking with Mr. Prior. Opposd to this flimsy circumstantial evidence was the direct and positive testimony of Mr. Glenn that no pressure of any kind had been brought to bear upon him by anyone to discharge Mrs. Dunn because of the picket line incident, and that even though such pressure had been brought to bear upon him, he would not under any circumstances have discharged her for said reason. He also testified that the only pressure ever exerted upon him by anyone to have her discharged was complaints made by certain subscribers that she was incompetent and was not rendering them efficient service. He also testified definitely and positively that she was discharged solely for a number of specified causes, all of which were valid and proper reasons for discharging any employee, and his testimony as to the

reasons for her discharge was in many material respects fully substantiated and corroborated by the testimony of other witnesses.

We respectfully submit and contend that regardless of any jurisdictional question, the Board's finding of a violation of the Act by the Exchange and its order for reinstatement of Mrs. Dunn was wholly unsupported by any substanial evidence and is contrary to law.

The Board in support of its legal position in this matter cited several cases, the holdings of which were substantially as follows: That it is an unfair labor practice for an employer to refuse to employ a person solely because such person belongs to a labor organization; that it is an unfair labor practice for an employer to discharge an employee because he mistakingly believes the employee is a union member or is engaged in union activities; and that it is improper for an employer to discharge an employee solely because the employee's union activities extend outside his own employment. The Board, however, failed to cite any decisions which cover the facts of the instant case, and all the cases cited by the Board are, as shown by our brief heretofore filed, readily distinguishable.

It is well estabished that mere conjecture and suspicion that an employee is discharged because of union activities or suspected union activities where there is evidence that the employee was discharged for cause are not sufficient to support a finding of discrimination. **N. L. R. B. v. Thompson Products Inc.,** 97 Fed. (2d) 13, 17 (C. C. A. 6); **Cupples Co. v. N. L. R.**

B., 106 Fed. (2d) 100, 118, (C. C. A. 8); **Burlington Dyeing & F. Co. v. N. L. R. B.**, 104 Fed. (2d) 736, 739 (C. C. A. 4); **Cudahy Packing Co. v. N. L. R. B.**, 116 Fed. (2d) 367, 371 (C. C. A. 8).

In the case against the Exchange there was an entire lack of any evidence either direct or circumstantial that the discharge of Mrs. Dunn would or did in anywise affect, burden, obstruct or interfere with interstate commerce. The Board contends that the Exchange being an instrumentality of interstate commerce, the discharge of one of its employees would automatically have such result. We submit, however, that no such result followed her discharge, and that Congress when passing the National Labor Relations Act did not intend that it should have the construction or application which is now contended for by the Board. We find light on the wording and intent of the Act in House of Representatives Report No. 1147, 74th Congress, First Session (1935). We quote from the report at page 10:

> "The definitions in subsections 6 and 7 are intended as the basic jurisdictional definitions as used in their appropriate settings in Sections 9 and 10. The bill is based squarely on the power of Congress to regulate commerce among the several states and with foreign nations. It does not apply to controversies or practices of purely local significance, which do not presently or potentially burden or obstruct the free flow of such commerce.
>
> "The Committee Amendment to subsection 6

narrows the definition of interstate commerce by not making it extend to transportation or communication that is merely 'related to' interstate commerce. This change has been made in view of the doubts that the Schechter Case casts upon the validity of regulating practices that are merely 'related to' or 'indirectly' interstate commerce.

"The new definition inserted by the Committee Amendment to subsection 7 also helps to confine the bill to the proper sphere under the Schechter decision by removing from its purview practices which merely 'affect' interstate commerce. Under this Amendment the bill is confined to practices 'burdening or obstructing' interstate commerce. These words have received repeated recognition in court decisions as fit bases for Federal jurisdiction."

The Board also found that the discharge of Mrs. Dunn automatically had the effect of discouraging "membership in the Federal as well as in labor organizations generally." It is impossible to perceive how under the facts of this case her discharge could possibly have such result, particularly in view of the fact that she, herself, admitted that she was not a member of any union and had never assisted or attempted to assist any union, and there was no evidence whatever that she was either interested in any union or was even sympathetic with any union. The Board also contends that even though her discharge did not have the effect of discouraging membership in any union, it might have the possible effect of dis-

couraging her from subsequently joining a union. This contention, however, is without any support in the evidence and facts of this case.

If the Board's theories and contentions in this case are correct, the discharge of any employee by an employer who is engaged in interstate commerce would ipso facto have the effect of burdening, obstructing and interfering with the free flow of interstate commerce, and would also have the effect of discouraging the discharged employee from thereafter availing himself of his right of self-organization. We submit that such unnatural and illogical result was not intended by Congress and is not a proper construction of the Act and is contrary to law.

We have carefully read and analyzed the authorities cited by the Board in support of its position, but fail to find therein any holding which bears directly upon the precise question even by analogy. The presumption is that the employer has not violated the law, and the burden of proof is upon the Board to show that an employee has been discriminatorily discharged. **N. L. R. B. v. Union Mfg. Co.**, 124 Fed. (2d) 332, 333, (C. C. A. 5); **N. L. R. B. v. Goshen Rubber & Manufacturing Co., 110 Fed. (2d) 432.**

We submit that in the instant case the Board has failed to overcome the presumption of innocence and to sustain its burden of proof, particularly as regards the Exchange, and that the Court upon a rehearing of this case should as a matter of law deny enforcement of the Board's orders.

CONCLUSION

Wherefore, each of the respondents respectfully prays that its petition for a rehearing be granted, and that the decision heretofore rendered be annulled as to each of the respondents for the reasons hereinbefore set forth.

Dated: Hanford, California, June 10, 1943.

SIDNEY J. W. SHARP,
M. WINGROVE,
Attorneys for Respondents
and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for respondents and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, Hanford, California,
June 10, 1943.

M. WINGROVE,
Of Counsel for Respondents
and Petitioners.